Nadler Explores Legislation to Reform the Military Commissions System

Thursday, 30 July 2009

WASHINGTON, D.C. – Today, Congressman Jerrold Nadler (D-NY), Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, held a legislative hearing on “Proposals for Reform of the Military Commissions System.” The Subcommittee received testimony on the current state of the military commissions, reviewed various proposals, and examined language recently adopted by the Senate to reform the U.S. military commissions system.

Rep. Nadler expressed concerns with the way the debate on the military commissions system has progressed. Speaking at the hearing he said “I fear we are creating a system in which we try you in federal court if we have strong evidence, we try you by military commission if we have weak evidence, and we detain you indefinitely if we have no evidence.”

Testifying at the hearing were:

David Kris, Assistant Attorney General, Department of Justice;

Jeh Charles Johnson, General Counsel, Department of Defense;

Major David J.R. Frakt, USAFR, Detailed Defense Counsel for Mohammed Jawad;

Colonel Peter R. Masciola, USAFG, Chief Defense Counsel, Office of Military Commissions; Steven

A. Engel, Dechert LLP; and,

Eugene R. Fidell, Senior Research Scholar in Law and Florence Rogatz Lecturer in Law, Yale Law School.

Two months after the September 11th terrorist attacks, President Bush signed an executive order establishing a military commission system for the trial of detainees. That order drew immediate criticism and concern that individuals would be detained without adequate due process. Those concerns proved well founded. Over the past seven years, approximately 800 individuals have been detained at Guantanamo Bay, with some 500 already having been released before President Obama took office in January 2009. In those seven years, only three detainees have been convicted of terrorism offenses using the military commissions, and approximately 240 individuals remain at the facility.

In announcing his intention to close the Guantanamo facility in January 2009, President Obama ordered his Administration to determine how best to resolve these remaining cases and, in the meantime, temporarily halted use of military commissions pending the outcome of that review and an examination of the adequacy of the military commission process itself.

Today’s hearing provided the Subcommittee with the opportunity to consider the specific reforms passed by the Senate as part of the National Defense Authorization Act FY 2010, and to consider possible approaches to the problem.

The text of Nadler’s opening statement follows:

Today, the Subcommittee examines proposals for reform of the military commission system, and, more importantly, how we in Congress can work together productively, and with the Administration, to clean up the terrible legacy of the Bush Administration’s detention policies in a manner that provides us with a legitimate legal framework going forward.

Over the past seven years, approximately 800 individuals have been detained at Guantanamo Bay, Cuba, with some 500 already having been released before President Obama took office in January 2009. In those seven years, only three detainees have been convicted of terrorism offenses using the military commissions, and approximately 230 individuals remain at the facility. Most of these men have been held for at least 4 years; some have been detained for more than 6 years.

By contrast, approximately 200 individuals have been charged with international terrorism, prosecuted, convicted, and sentenced to long prison terms using our federal courts.

These number speak for themselves. Yet the Obama Administration, after initially halting use of the military commissions and beginning an in-depth case-by-case review of the individuals still being detained at Guantanamo, has said that the commissions are necessary. Why? The general explanation is that military commissions provide the flexibility that is necessary to account for “the reality of battlefield situations and military exigencies,” such as chain of custody concerns, the need to use hearsay statements, and an appropriate test for determining whether incriminating statements were coerced or voluntary under the circumstances.

This might explain the need in cases where an individual was caught in the heat of battle, but it does not explain the need in other circumstances.

My concern remains, as I articulated at our hearing a few weeks ago, that we are creating a system in which we try you in federal court if we have strong evidence, we try you by military commission if we have weak evidence, and we detain you indefinitely if we have no evidence.

Mohammed Jawad’s case, which was again before a federal judge today, provides just one example. At our hearing a few weeks ago, Lt. Col. Darrel Vandeveld, the lead military prosecutor responsible for bringing Mr. Jawad to justice in the military commission system, testified that he resigned because he could not ethically or legally prosecute the case. After discovering exculpatory evidence that had been withheld from the defense and determining that Mr. Jawad’s confession – the only evidence against him – had been obtained through torture, Lt. Col. Vandeveld was unable to convince his supervisors to reach a plea agreement that would have allowed for Mr. Jawad’s release and return to his family after nearly 7 years in Guantanamo. Convinced that it was not possible to achieve justice through the military commission system, Lt. Col. Vandeveld felt he had no choice but to resign his post.

A military judge and a federal judge have since ruled that Mr. Jawad’s confession was obtained through torture. In the federal habeas corpus proceedings, the judge has called the case an “outrage,” and has urged the Administration to send Mr. Jawad – who may have been 12-years-old when captured in 2002 – home.

Mr. Jawad’s case is not an anomaly. In 26 of the approximately 31 habeas corpus cases brought by Guantanamo detainees, federal judges have concluded that the government does not have sufficient evidence to continue the detention.

These numbers are staggering. Not one case, not two – but in 85% of the cases where an individual finally has gotten meaningful review, federal judges have found that there are no grounds for detention.

This is a stain on American justice. Not only has the system served as a tremendous recruiting tool for our enemies, it has proven legally unsustainable and unjust. We would challenge such a system if set up by another country to detain and try Americans. We should demand no less of ourselves.

The detainees at Guantanamo and other individuals who we may capture today or tomorrow are accused terrorists. They have not been proven to be terrorists, and while officials in the previous administration were fond of claiming that its detainees at Guantanamo were “the worst of the worst,” the Bush administration released the vast majority of them, approximately 500 in all. Apparently, the Bush Administration did not really think they were “the worst of the worst.”

The people who we have detained because they were turned over to us by someone with a grudge, or by someone who wanted to collect a bounty, do not belong in custody. We have an obligation to determine who should and should not be imprisoned, and to afford fair trials to those we believe have committed crimes. This is especially important if our government plans to seek prisons sentences, or to execute, those convicted.

There is no doubt that keeping America safe is paramount. We must decide how to deal with these individuals in a manner that ensures that our nation is protected from those who would do us harm, in a manner that is consistent with our laws, our treaty obligations, and our values. We are the United States of America, and we have traditions and beliefs worth fighting for, and worth preserving.

This problem will not go away simply because we close Guantanamo. We are still fighting in Afghanistan and Iraq. We are still battling terrorists around the world. We will continue to have to intercept and detain individuals who have attacked us or who threaten us. We need to be sure that however we handle these cases, we do not conduct kangaroo courts.

This debate has been dominated by a great deal of fearmongering. That is no way to deal with a problem of this magnitude. Fanning the flames with the unfounded claim that it is a threat to our national security to transfer individuals to the U.S. for detention and trial defies logic and reality. We have long housed and prosecuted dangerous criminals and terrorists in my District and elsewhere. It is an insult to our law enforcement and military to suggest that they cannot do the same with regard to those individuals that we have been holding at Guantanamo.

Others have argued that because some individuals released from Guantanamo have turned to battle we must now hold all others forever. We are not a police state. In order to imprison anyone, we must have sufficient evidence to do so.

Much as some people would like to drop detainees down a hole and forget about them that is simply not an option – legally or morally. It is also not necessary. We are not the first country in history to have to deal with potentially dangerous people, indeed, this is not the first time this country has had to deal with potentially dangerous people.

I do not underestimate the enormity of the challenge, both from a security standpoint, and a legal one. But we can and will find solutions that honor the rule of law and, in so doing, keep us safe. I look forward to the testimony of our witnesses with confidence that you will be able to provide guidance as we look forward.

Thank you. I yield back the balance of my time.